GN4.62

No. 16 of 1963. 33/1963

IN THE PRIVY COUNCIL.

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

B E T W E E N

BILLY MAX SPARKS Appellant

- and -

THE QUEEN Respondent

74158

CASE FOR THE RESPONDENT

Record

1. This is an appeal from a judgment, dated the 12th February, 1963, of the Supreme Court of Bermuda (Abbott, C.J. and a jury), whereby the Appellant was convicted of indecently assaulting a girl under the age of fourteen years, and was sentenced to two years' imprisonment. P.89 P.121

2. Section 324 of the Bermuda Criminal Code reads as follows:-

"(1) Any person who unlawfully and indecently assaults a woman or girl, is guilty of misdemeanour, and is liable to imprisonment for a term not exceeding seven years, with or without whipping.

(2) It shall be no defence to a charge of indecent assault on a girl under the age of fourteen years to prove that she consented to the act of indecency".

3. The questions arising in this appeal are the following:

(a) whether evidence was admissible of a statement made by the assaulted child (who was 3 years of age at the date of the assault) to her mother shortly after the assault, the child not being a witness at the trial and there being no issue of consent;

(b) whether certain statements made by the Appellant to police officers, or in their hearing, were rightly admitted in evidence;

(c) whether on any view there has been such a miscarriage of justice as should cause Her Majesty in Council to interfere with the course of these criminal proceedings.

P.1. 4. On the 14th January, 1963, the Appellant was arraigned before the Supreme Court on an indictment charging that, on the 3rd November, 1962, in Warwick Parish, he unlawfully and indecently assaulted Wendy Sue Bargett, a girl under the age of fourteen years, contrary to s. 324 of the Criminal Code. He pleaded 'Not guilty', and the trial was fixed for the 28th January. It began on that day, and continued on the 29th and 31st January and the 4th, 5th, 6th, 7th, 8th, 11th and 12th February.

P.2. ll 4-10. 5. In opening the Crown's case on the 28th January, 1963, the acting Attorney-General asked for the Court's ruling whether what the child had said to her mother was admissible. He said the child's statement was a "recent complaint", but submitted that, since the child, being three years old, was not going to be called as a witness and consent was not material, the

P.2. ll 12-20. statement was hearsay and inadmissible. Counsel for the Appellant submitted that certain statements made by the child on the night of the offence formed part of the "res gestae" and therefore were admissible. He agreed that other

P.2. l 27 statements made by the child later ought to be excluded as hearsay. The learned Chief Justice postponed his ruling, in order to give counsel an opportunity to produce authorities in support of this submission.

6. Certain witnesses, including Sylvia Ann Bargett, the mother of the child, then gave evidence. When the trial was resumed after the

P.7. midday adjournment, counsel for the Appellant addressed the Court on the admissibility of the

P.7. l 26 child's statements to her mother. He expressly abandoned his previous submission that the statements were part of the "res gestae", but submitted that evidence of what the child said on the evening of the assault was admissible as a complaint. The acting Attorney-General submitted that, as the child had not given and would not give evidence, her complaint to her mother should be excluded as it could not show

P.9. l 10 consistency of the child's story. The learned Chief Justice ruled that evidence of the child's complaint to her mother on the evening

of the assault was inadmissible. No application was made on behalf of the Appellant to recall Sylvia Ann Bargett for further cross-examination, nor did the Appellant seek to call the child, Wendy Sue Bargett, as a witness for the defence.

7. The evidence may be summarised as follows:-

At the date of the offence Wendy Sue Bargett was aged three years and nine months. Her mother, Mrs. Bargett, took her to the Bermuda Bowl at 8 p.m. on Saturday, the 3rd November, 1962, in her car, and left her asleep in the car while she (Mrs. Bargett) went bowling. The car doors were unlocked, and the windows closed with the exception of the louvres, which were left open to let in some air. According to Mrs. Bargett, the child was old enough and had sufficient knowledge and intelligence to be able to open the doors of the car, had she wished to do so. Various visits were paid to the car to see how the child was. Mrs. Bargett saw her at about 9 - 9.15 p.m., when she was very fast asleep. It was then raining quite hard. At about 9.30 p.m., a Miss Tribley, a friend of Mrs. Bargett, went to the car, and saw that one of the rear doors of the car was open and Wendy was missing. Miss Tribley searched for Wendy in the parking place and along the street and found no sign of her. It had stopped raining. Miss Tribley then went back to the Bowling Alley and fetched a Mrs. Flood to come out and help her search. They searched for a further five minutes without success, and then told Mrs. Bargett. She came out and a further search was made, but again without success. The police were then informed, the time being 9.47 p.m. Meanwhile the Manager of the Bermuda Bowl had organised a search, in which about 24 people took part. The police arrived at about 10 p.m. In the course of their search two pairs of panties, which Wendy had been wearing, were found on the ground under or near a car in the car park.

P.54 l.20
P.6. l.16
P.15 l.5
P.6 l.22

8. At about 10.40 p.m. P.C. Tattersall received information over the police car radio, as the result of which he went to Sergeant Cochrane's house, which is only a short distance away from the Bermuda Bowl. There P.C. Tattersall found Wendy. He took her back to the Bermuda Bowl and restored her to her mother. Her mother found some blood on Wendy's finger and body. She spoke to Wendy, and it was then that Wendy made the statement which the learned Chief Justice held to be inadmissible in evidence. Wendy was then taken to hospital and examined by Dr. Shaw. He found that she was bleeding from the vagina, that

there were scratches and a stretch tear of the hymen; in his view nothing larger than a finger had passed through. There were some other minor abrasions on the child.

9. The evidence as to the Appellant's whereabouts and behaviour that evening was as follows. He came off duty from the Control Tower at Kindley Airport at 4.45 p.m. He went with some friends to a bar, where he had some drinks. He and a friend, Sergeant Donovan, then went to the Swizzle Inn, where they had more drinks and met Sergeant Cochrane, who invited the Appellant to his house to celebrate his (Sergeant Cochrane's) birthday. The
P.79 Appellant went in Sergeant Cochrane's car to
P.80 Sergeant Donovan's house. On the way the Appellant drank some neat sloe gin from a bottle, and at Donovan's house he had another drink. The Appellant had left his own car at Sergeant Donovan's house before going on duty, and he now drove it to Sergeant Cochrane's house, where he arrived at 8.45 to 9 p.m. He seemed very drunk. He did not stay long and was later seen by Sergeant Cochrane backing his car out from the house. The Appellant was next seen at the Bermuda Bowl. A witness, Mrs. Klemmer,
P.5 1.20 } said that she saw the Appellant at the Bermuda
P.5 1.28 } Bowl between 9 and 9.10 p.m. He was obviously drunk. Another witness, Mr. Richardson, said that he saw the Appellant driving his car out of a parking place a little distance away from the main Bermuda Bowl parking place, and the Appellant's car hit another car in the process. Mr. Richardson put the time at about 9.15 to 9.20 p.m. Another witness, Mr. Simons, said that he saw the Appellant at the Bermuda Bowl between 9.50 and 10.10 p.m. The Appellant was obviously very drunk. The Appellant was next seen at Sergeant Cochrane's house again. The party there was still going on, although most of the guests had left, when the Appellant entered the house with Wendy apparently following him. The time seems to have been about 10.15 p.m. Wendy's dress was dry. She was crying, but soon calmed down. The Appellant
P.11. 1.21 was wet from head to foot, and was drunk. He told Airman Neberman, who was one of the guests still at Cochrane's party, that Wendy had followed him from outside a church.

10. At the trial the Appellant said he did not remember leaving Sergeant Cochrane's house after his first visit. His next recollection was of

his car getting stuck. He did not remember getting out of the car, but he did remember being on his way back to Sergeant Cochrane's house. While on the way back there he saw Wendy in the road, very near the house. She was crying, and said something about her mummy. He took her into Sergeant Cochrane's house.

11. In the Respondent's respectful submission, the significance of the matters summarised in the two preceding paragraphs is that there was evidence that the Appellant was seen at and near the Bermuda Bowl with his car about the time when Wendy disappeared from Mrs. Bargett's parked car at the Bermuda Bowl; that, if that evidence be accepted, there was a period of about an hour between the Appellant's being seen at and near the Bermuda Bowl and his arrival at the Cochrane's house followed by Wendy; that the Appellant in his evidence given at the trial gave no satisfactory account of his movements during the period between leaving Sergeant Cochrane's house and his return there followed by Wendy; that, if Wendy had got into the Appellant's car at the Bermuda Bowl before it started raining and had remained there until it stopped raining, this would explain why her clothes were dry when she was found following the Appellant into Sergeant Cochrane's house; that, if the Appellant had been outside during the heavy rain trying to get his car free from the ditch where it had stuck, this would explain why his clothes were wet from head to foot. Taken by themselves, these may have been matters of suspicion only. Taken with written and oral statements made by the Appellant to or in the hearing of the police officers, they constituted a very strong case against the Appellant.

12. At the trial Counsel for the Appellant objected to the admissibility of these written and oral statements made by the Appellant at the Police Station. Accordingly the events at the Police Station and their admissibility in evidence formed the subject of a "trial within a trial". Pp.16-40

13. Immediately before this "trial within a trial", Det. Const. Oliver gave evidence that in the course of his investigations he and Det. Const. Leng went to the Appellant's home at 12.30 p.m. on the 4th November and saw the Appellant in the presence of his wife. Const. Oliver told the Appellant that he understood that the Appellant had found a child in Khyber Pass and asked him whether he would give a statement of the circumstances in which he found the girl. The Appellant agreed to do so, and Const. Oliver wrote down a statement (Ex.5) at the Appellant's dictation, as follows: P.15 ll 23 - 35

Record

P.123 l. 32 - P.124 l. 22. "Billy Max Sparks, South Shore, Warwick, W/A Staff Sergeant U.S.A.F. 28777195 27 years.

States:-

On the evening of Saturday, Nov. 3rd, 1962, between 8.30 and 9.00 p.m. I went to a party at the residence of S/Sgt. Cochrane on Khyber Pass, Warwick. I had a few drinks. I had been drinking earlier and I was pretty high.

I left the party in my car and set off westward along Spice Hill Road. After about ¼ - ½ mile I ran into a ditch and spent some time trying to get out. I then set off to walk back to the party for help. At the church just west of Cochrane's I saw a little girl, I think she was standing still, she was crying and saying something about her mother. I thought she possibly belonged to someone at the party and so I took her to the house. I told the people there I found her near the church then tried to arrange for help to get my car out. I remember Clayton Cameron asking the number of the Police then I left. I did not go back in the house again.

As far as I can figure it, it must have been close to 10 p.m. when I found the girl and I just got the impression that she was lost and frightened.

(Signed) Billy M. Sparks

Above statement recorded by me at South Road, Warwick at 12-30 p.m. 4.11.62, read over to and signed by maker as correct after being asked if he wished to make any alterations.

(Signed) T.A. Oliver D/C."

P.15 l.36 - P.16 l.6. Const. Oliver then made further investigations. He and Const. Leng returned to the Appellant's house at 3 p.m. the same day and again saw the Appellant in the presence of his wife. Const. Oliver said that he had been making further enquiries and that there seemed to be discrepancies in Ex. 5. He asked whether the Appellant would come to Police H.Q., as he wanted to ask the Appellant some more questions. He told the Appellant that he was not under arrest. The Appellant agreed to come.

At Const. Oliver's request, the Appellant handed to him the uniform which he had been wearing the previous night and, also at Const. Oliver's request, the Appellant drove his own car to Police H.Q. Const. Oliver was about to give evidence of statements made by the Appellant at Police H.Q., when counsel for the Appellant made his objection as to the admissibility of this evidence. The learned Chief Justice then heard evidence relevant to the objection in the absence of the jury. P.16 l.10 P.16 l.19- P.36 l.25

14. A summary of Const. Oliver's evidence, given in the absence of the jury is, as follows:-

He said that he took the Appellant to Police H.Q. because it was more convenient to question him there than at his home with his wife and children about. When they reached the Police H.Q., they went to Western C.I.D. Office, which consisted of two rooms with an open door between them. One was the constables' office, the other was the Inspector's office. Sgt. Bean was in the Inspector's office. The Appellant was in the constables' office. Const. Oliver was with the Appellant from 3.30 until 5 p.m., except for two, or possibly more, occasions when he went out for a few minutes. Sgt. Bean joined Consts. Oliver and Leng and the Appellant at about 5 p.m. Up to that time there had been no change in the Appellant's status, he was not under arrest and Const. Oliver had not made up his mind to charge him with this offence; if the Appellant had wanted to go home, he would have been allowed to do so. Sgt. Bean said to the Appellant that the last time the little girl was seen was at 9.20 at the Bermuda Bowl and that the next time she was seen she was in the Appellant's company. Sgt. Bean asked the accused (about 5 p.m.) if he had any idea how she got there. The Appellant then said "I did it". This answer was given voluntarily. No threat or promise was made to the Appellant at any time when Const. Oliver was present during the interview with the Appellant. Immediately the Appellant said "I did it", Const. Oliver cautioned him. After the caution the Appellant elected to make a statement. No threat or promise was made. Const. Oliver recorded the statement (Ex. 9) which reads, as follows :- P.17 l.28 P.17 l.38 - P.20 l.13 P.17 ll. 17 - 26 P.18 l.29 P.19 ll. 17 - 20

"Billy Max Sparks, South Shore, Warwick Parish, W/A Staff Sergeant U.S.A.F. No. 28777195; 27 years P.125 l.3 - P.126 l.19

States:-

I have been told that I am not obliged to say anything unless I wish to do so, but whatever I say will be taken down in writing and may be given in evidence

(Signed) Billy M. Sparks

On Saturday the third of November 1962 while drunk, I was at the Bermuda Bowl parking lot and did give a little girl a ride in my car. I remember her walking to me in the parking lot and I believe I just opened the car door and she climbed in, I don't know.

I remember driving along Spice Hill Road and I either parked or ran off the road, I don't know which. I took hold of her and put my finger between her legs. I tried to get the car started, I tried to push it but it wouldn't start. I don't know how I got to the party I guess I must have walked. The girl was with me when I got to the party I thought that by leaving her there she'd get home. I'm very sorry and ashamed.

(Signed) Billy M. Sparks

(Witness) M. Leng

The above statement was recorded by me at Police H.Q., Prospect, between 5 p.m. and 5.20 p.m. at the dictation of the person making it. I read it over to him and asked him if he wished to make any corrections. He said it was correct and signed it.

(Signed) T.A. Oliver D/C."

P.19 l.13

15. Under cross-examination, Const. Oliver agreed that he and Const. Leng reconstructed the Appellant's movements the previous evening

P. 19 ll. 16 - 20

to the Appellant, but he denied that he asked the Appellant any questions during the recording of his statement; he said that the Appellant dictated the statement and that he (Oliver) wrote it down; the Appellant was not questioned in any way after signing the caution and uttering the first sentence of the statement.

P.18 ll. 37 - 44

In further examination-in-chief, Const. Oliver said that at about 6.10 p.m. the telephone rang and Const. Leng answered it. Const. Leng said that the Appellant's wife was on the line. Const. Oliver told the Appellant that he could speak to his wife. The Appellant did so. Again no promise or threat was made. The Appellant listened for a few seconds and then he said "Honey I did it". Then after a pause he said "All the proof in the world". Then after another pause he said "You know how

drunk I was". In re-examination Const. Oliver said that the Appellant was their no. 1 suspect but that, until he said "I did it", they had not sufficient evidence to charge him. P.20 l.16

16. The next witness called in the absence of the jury was Det. Const. Leng. A summary of his evidence given in the absence of the jury is as follows :-

He said that at about 3.p.m. he and Const. Oliver took the Appellant to Police H.Q. When they fetched the Appellant from his house, Const. Leng had a strong suspicion that the Appellant had committed the offence. He said that he did not know what he would have done if the Appellant had refused to come to Police H.Q. Const. Oliver told the Appellant that he was not under arrest. They reached the H.Q. at about 3.30 p.m. Const. Oliver questioned the Appellant first. Sgt. Bean joined in at about 3.50 or 4 p.m. He came into the constables' room from outside the building. He stayed there until the Appellant was taken to Hamilton Police Station, which was after 6 p.m. Const. Leng left the room two or three times during the questioning for 5 or 10 minutes each time. When he went out, Const. Oliver and/or Sgt. Bean was left with the Appellant. Sgt. Bean did not stay in the constables' office all the time. He left the office two or three times. His absences from the office were much the same as Const. Leng's and Const. Oliver's. Questioning of the Appellant began almost at once on their arrival at H.Q. In the course of the questioning Const. Leng verbally reconstructed the Appellant's movements to him. He had not made up his mind to charge the Appellant until the Appellant said "I did it", but strongly suspected him. Once the Appellant said "I did it", Const. Oliver cautioned him. The Appellant elected to make a statement, during the making of which Const. Leng was present. No threat or promise was used to induce a confession. The statement was taken down verbatim by Const. Oliver. No questions were asked of the Appellant during the making of the statement. The Appellant was given an opportunity of reading the statement over. Const. Oliver read it over, and the Appellant could see it while he was reading it over. The statement was on the desk between Const. Oliver and the Appellant. Once the statement had been read, the Appellant signed it. At about 5.40 p.m. Const. Leng was taking some personal particulars from the Appellant, when the Appellant asked if he was going to be detained in custody. Const. Leng did not know and told the Appellant so, as he had to refer to a senior officer. The Appellant then said that he did not want to face his neighbours and friends from the American Base. At about 6.10 p.m. the telephone rang

P.20 l.24
P.21 l.6
P.23 l.18
P.23 l.19
P.20 l1. 25 - 28
P.21 l.29

and Const. Leng answered it. The caller was the Appellant's wife, who asked if she could speak to the Appellant. She had previously telephoned the Police H.Q. making the same request, but then Const. Leng had refused to let her speak to the Appellant as he was being questioned. However, on this occasion the Appellant was allowed to speak to his wife.

P.21 1.44 When the Appellant picked up the telephone, he said, apparently straight away, "Honey I did it". Then there was a pause and the Appellant said "Yes, all the proof in the world". There was another pause and then the Appellant said "You know how drunk I was".

17. The last prosecution witness to be called in the absence of the jury was Sgt. Bean. A summary of his evidence given then is as follows:-

P.25 1.3 He said that the first time he saw the Appellant on the afternoon of the 4th November was at about 4.45 p.m., when he went into the office. During the time he was there no threat or promise was made to the Appellant. Sgt. Bean remembered his question and the Appellant's answer, "I did it". After the Appellant said "I did it", he was immediately cautioned by Const. Oliver. Sgt. Bean had regarded the Appellant as the number one suspect, but up to the moment when the Appellant said "I did it", Sgt. Bean could

P.25 1.34 not have proved a case against him. Sgt. Bean made up his mind to charge the Appellant when he said "I did it". After caution the Appellant elected to make a statement. Sgt. Bean was present while the statement was recorded. It was taken down verbatim. The Appellant was not questioned while he made the statement. When the statement was concluded, Const. Oliver read it back to the Appellant, who was sitting alongside Const. Oliver. The Appellant could have read it, had he wished. The Appellant

P.25 1.50 signed the statement in Sgt. Bean's presence. About an hour later there was a telephone call from the Appellant's wife. The Appellant was allowed to speak to her. When he took the 'phone he spoke immediately, and said "Honey I did it". Then there was a pause, and the Appellant said something which Sgt. Bean could not hear. Sgt. Bean heard no more of this conversation.

18. The next witness to give evidence in the absence of the jury was the Appellant. His evidence was as follows :-

He said that Consts. Oliver and Leng called at his home at about 12 noon on the 4th November, and then later the same day at about 2.30 p.m. They said that certain things about his movements the previous night were not clear to them and asked if the Appellant would mind going with them down town. The Appellant agreed. He drove his car with Const. Leng to Police H.Q., and was taken to a room there. The Appellant then described what took place in the following passage from his evidence :- P.27 l.2

"There I was questioned by Oliver and Leng. Later I saw Sgt. Bean. That was within 20 or 30 mins. after my arrival. In the same room. Bean said there were things he wanted to clear up, that my movements of the night before were not correct in my first statement, - the one given at 12 noon. He said 'we have witnesses and can prove that you were at the Bda. Bowl'. I said something to the effect that if I had been there people would have seen me. I had earlier said that I didn't remember where I had been most of the night before because I was drunk. I said if witnesses had seen me at Bda. Bowl I must have been there. Bean said he had had many cases of this 'convenient loss of memory'. He asked me if it would be less embarrassing for me if Oliver and Leng left the room, so that I could give him a statement. I said 'A statement about what, I can't remember anything?'. I don't remember what Bean then said. Later he said he wanted a statement from me to avoid embarrassment to my family and my friends. He said the further the investigations went the more publicity there would be and more people would know about it. I can't exactly recall that he mentioned newspapers. Bean then went into the other room of the office leaving the door open. Oliver and Leng were still with me. They went on questioning me - mostly Leng did. He said 'We could get you for drunken driving, hit and run, leaving the scene of an accident and molesting the child. All we want is a statement about the child. We have spoken to this girl, she is no dumb-bell, she knows who did this to her'. I said 'My boy of 4 would know anybody who harmed him, why can't the little girl see me'. I was told it would be too hard on her. At that time I did not know what the offence against the child consisted of. I gathered it was rape and I said 'This is a hideous thing you are accusing me of' and someone said 'What do you mean' and I said 'Raping a child' Leng said 'It's not nearly as serious as that, this is completely different and happens quite often and in fact it is only a misdemeanour'. Questioning went on. Leng reconstructed crime to me. Oliver was there and I believe Bean as well. Leng said 'You were at Bda. P.27 l.21 - P.29 l.25

Bowl and saw the little girl - possibly she was relieving herself and you took her in your car and drove up Spice Hill Road, parked and indecently assaulted the child, couldn't get your car started, took the child with you to the party'. I asked him why I would take her to a place where 25 people would know me if I had done this thing and Leng said 'You had no other place to take her'. Bean spoke to me again. He used more of the same type of questioning. I don't recall his exact words. He suggested I should confess. I made same reply saying I do not remember where I had been. I made a statement eventually. I don't think Bean was actually present when I made it but he was when I said I would make a statement. There was then a conversation between me and Bean I said 'Is all you want a statement from me?' he said 'Yes', and I said 'O.K., I guess I did it'. He said 'You can't guess' I said 'O.K. damn it, I did it'. He told Oliver to take my statement and that was the last I saw of him. I then made a statement. This one (Ex. K in Magistrates Court). I signed it as correct. It is not in my words and it is not a true statement. I first began by asking 'Where shall I start?' I was told 'Start at the Bowling Alley'. I said 'I saw the little girl and gave her a ride' I think Oliver said 'How did she get in the car?' I said 'Hell, I don't know, maybe I just opened the door and she got in'. Then I carried on with the statement saying 'I drove up Spice Hill Road, parked the car and molested her' Leng asked 'What do you mean, molested her?' I said 'Hell, I don't know what am I supposed to have done to her?' Leng said 'You put your finger in her' and I said 'O.K. damn it, I put my finger in her'. Leng said 'Front or back?' I said 'Hell, I don't know' I don't believe I said 'I took hold of her and put my finger between her legs'.

Exhibit 9
P.125

I consider the statement which I signed as correct to be a complete fabrication. I believe, I now say, that I did say 'I thought that by leaving her there she'd get home'. Then Oliver asked 'Do you want to say anymore' and I said 'I am very sorry and ashamed'. At Prospect my wife called up three times. I was only allowed to speak to her once - on the last occasion she phoned. I asked on one of the other two occasions why I could not speak to her and was told because I was being questioned. I'm not certain of the words I used to my wife but it was somethings like this 'Honey, they said I did it, I guess I did it'. She said 'Do they

have any proof' and I said 'All the proof in the world'. Then Mrs. Cochrane came on the line and also someone else. I spoke about getting my wife off the Island to avoid her being embarrassed. I have four children, 6, 4, 2 and 1. I am quite sure I did not do this to this child. I signed confession because I got to the point where I believed them. I had had an argument with my wife about being out the night before. I was in a confused state of mind. I did not work that morning".

Under cross-examination the Appellant described the circumstances in which he came to make the statements, the admissibility of which was challenged, in the following passage from his evidence:-

"During investigations at C.I.D. Office I was told it was not rape but something much less serious, indecent assault on a little girl of 3. I didn't know what indecent assault was until after I said 'If you say I did it, I guess I did it'. I said that without knowing the nature of the offence. I don't excuse my mental state when I said that. I agree it was verging on lunacy to accept I had committed a crime without knowing the nature of the crime. I signed statement made at Police H.Q. (Ex. K. at magistrates court). I signed it as correct. The police knew it was not correct, and I knew it was not correct. I accept that by signing it I am acknowledging it as being my statement. There is nothing in it to suggest I can't remember. Several times I asked Police for proof. They proved me to have been to Bda. Bowl, crashed my car and been to Cochrane's house. I accepted what they told me as proof. I accepted it when they told me where the indecent assault was supposed to have taken place. I signed the caution. I agree I was not obliged to say anything. I can't explain why I made this statement except what I have said already. I agree it is not a reasonable explanation, merely to say I can't account for my mental state at the time of making the statement. I was confused at that time. The caution was clear to me at the time. I made the statement (1) to prevent embarrassment to my family and friends (2) to avoid publicity and (3) to remove my wife from the Island. Leng told me my wife would have to remain in the Island for the investigation and trial. That was before I made the statement. From what Leng told me I gathered there was a possibility I would not be prosecuted by the civil power if I made a statement. I wasn't going to make my position any lighter by making a statement. I never imagined matter would be completely dropped. I thought military would be much more stringent. It was suggested to me by Leng that if I did not make a statement it would be the worse for

P.30 l.22 - P.31 l.34

Exhibit 9 P.125

me etc. I would be prosecuted in addition for the motoring offences. The details of what I was supposed to have done horrified me. But I put them in my statement (Mgte's Ex. K) I agree my evidence conflicts with police evidence. I think Bean may have made mistakes but Oliver and Leng are deliberately lying. The words 'I'm very sorry and ashamed' came as a result of Oliver suggesting I should say something to apologise to the child's parents. I asked to be kept in detention because I was too afraid to face my friends, even from the time I was taken to police H.Q. Much more so when I had made a written statement. I remember talking on the phone to my wife. I was very upset at the time. I agree my recollection may not have been so good as if I had been calm and collected. Police officers were not upset. If I am telling the truth, all three officers are deliberately lying. If don't know if Bean then supported his lie by making a note of what I said in his notebook. When I said 'All the proof in the world' I spoke to someone else. I may have said 'You know how drunk I was'".

Exhibit 9 P.125

19. The final witness to give evidence in the absence of the jury was the Appellant's wife, Rita Ann Sparks. The relevant passage from her evidence given then is as follows:-

P.32

P.33 11. 3 - 13 "During afternoon and evening of Nov. 4th I tried to reach acc. by 'phone. I didn't know exactly where he was. When I got through to the right place I spoke to Leng. I was told by him I could not speak to acc. because he was not available. I think this happened twice. At the third attempt I did speak to acc. Acc. said "Honey, I did it, I must have done it because they say I did it". I asked him "What proof do they have", he said "Every proof in the world" I had no more conversation".

20. The learned Chief Justice adjourned the trial in order to consider his ruling on the admissibility of the evidence of the Appellant's statements, and delivered the ruling when the Court sat on the 4th February. He said that for the purpose of the ruling he assumed that the Appellant's version of his interview with the police in the afternoon of Sunday, 4th November, 1962, was true, but that did not mean that in fact he accepted the Appellant's story in preference to that of the witnesses for the Crown. The suggestion to the Appellant that, if

P.36

P.37 1.4

he made a statement, he would not be prosecuted in the civil courts was not an inducement, because the Appellant himself said that the military courts would be more severe on him. Any inducement contained in the suggestion that, if he did not make a statement, he would be prosecuted for the motoring offences did not relate to the charge on which the Appellant was being tried, so had to be ignored. The only possible inducement there could have been was the suggestion that the making of a statement by the Appellant would reduce publicity and so avoid embarrassment to the Appellant's family and friends. Abbott, C.J. held that this was not an inducement calculated to make a subsequent confession untrue; nor did it continue to operate at the moment of the confession, because the Appellant's own evidence showed that the subsequent caution had the effect of removing all expectation of advantage from his mind.

21. Considering the four alleged confessions seriatim, the learned Chief Justice excluded evidence of the Appellant's answer, "I did it", to Sergeant Bean's question, "How did the child get there?" (i.e. into the Appellant's company). He said it did not seem to be a natural answer to the question, and he had misgivings about it. He admitted the written confession (ex. 9), and evidence of what the Appellant said to his wife over the telephone and of his asking to be detained so that he might not have to face his family and friends. Abbott, C.J. was, he said, satisfied that none of these three statements was affected by any inducement.

22. When the trial was resumed with the jury present, Consts. Leng and Oliver and Sgt. Bean for the prosecution, and the Appellant and his wife for the defence, again gave evidence about the circumstances in which the Appellant made those statements which the learned Chief Justice had ruled to be admissible. These witnesses' evidence on this point was much the same as the evidence which they had respectively given in the absence of the jury, though the Appellant's account was more detailed than his previous evidence on this topic.

23. At one point in his evidence before the jury, Const. Oliver said that the purpose of taking the Appellant to Police H.Q. was to get him to admit this offence. Const. Leng in his evidence before the jury said he and Const. Oliver had not taken the Appellant to Police H.Q. for this purpose. Const. Leng also said in his cross-examination:

P.43 l.43

P.47 l.22

Record

P.48 l.26

"I would have allowed him" - the Appellant - "to go free and unaccompanied if he had wanted to leave before 5 p.m. even though I myself was convinced he was guilty. I would have charged him had I been able to. Neither I nor /Const. Oliver/ was in a position to charge acc. before Sgt. Bean came into office".

Const. Leng amplified the evidence which he had previously given about the Appellant saying that he did not want to face his neighbours and friends from the American Base. In the absence of the jury he had said that the Appellant gave him the impression that for this reason he wanted to be detained. He was more explicit in his evidence given with the jury present. He said:

P.45 l.43

"He intimated he wanted to be detained, so that his friends from the Base and his neighbours would not know about it".

P.89

P.116 ll. 18 - 26

24. In his summing-up the learned Chief Justice dealt at length with the evidence and pointed out where the evidence of various witnesses conflicted. He also pointed out to the jury that the only evidence against the Appellant was his four confessions, namely,

(i) his statement (exhibit 9);

(ii) his statement in answer to the charge (exhibit 10),

"I must have been insane at the time due to drink and other causes";

(iii) his request to be detained;

(iv) his confession on the telephone to his wife.

The learned Chief Justice then directed the jury in the following terms:

P.116 l.45 - P.117 l.16

"It has long been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it is shown by the Prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

The person in authority in this case would of course be the one or more of the police officers.

Now it is for you, Gentlemen, to determine the weight to be attached to these four confessions, and each of them. You must, therefore, apply the principle I have just read to you, and if you are not satisfied that these confessions, or any one of them, is voluntary, you must reject it, disregard it and give no weight to it whatsoever. It is only considered properly acceptable in evidence against the accused if it is a voluntary statement".

The learned Chief Justice then directed the jury to consider each of the four confessions separately and to come to a conclusion on each. He suggested that the jury's first consideration should be the voluntary or other nature of these confessions. He said: P.117 l.45 P.118 l.46

" ..... if you think those confessions are not voluntary, you should give no weight to them at all, you should disregard them. If you disregard the whole four, then your duty is absolutely plain, you bring in a verdict of not guilty because you have in effect decided that there is no evidence against the accused. And, moreover, as I told you at the outset and recently when I read this extract from the law reports to you, you must be satisfied that the Prosecution have proved the confessions to be voluntary. It is not for the accused to prove that they were not voluntary. It is for the Prosecution to satisfy you that they were voluntary and if the Prosecution have not done that, then, Gentlemen, as I say, your duty is clear and your verdict should be not guilty". P.119 ll. 2 - 18

25. The jury, after retiring, found the Appellant guilty, by majority. The learned Chief Justice sentenced him to 2 years' imprisonment. P.88 l.24 - P.89 l.8

26. The Respondent respectfully submits that the learned Chief Justice was right in excluding evidence of statements allegedly made by Wendy to her mother. Such evidence would have consisted entirely of hearsay, and none of the special circumstances which may render hearsay evidence admissible was present. The evidence in question was therefore inadmissible.

27. On the other hand, the evidence admitted of statements made by the Appellant to police officers, or in their presence, was, in the Respondent's respectful submission, good and admissible evidence.

In considering the objection to the admission of this evidence, Abbott, C.J. applied well established principles, and rightly concluded that the statements were shown to have been made freely and voluntarily, and not as a result of any such conduct as might for such purposes have amounted to a threat or an inducement.

28. The learned Chief Justice's charge to the jury was, as the Respondent respectfully submits, full and accurate, and by no means unfair to the Appellant. The directions relating to the evidence of the Appellant's statements was entirely correct in law. The verdict shows that the jury was satisfied, as was the learned Chief Justice, that those statements were freely and voluntarily made.

29. The Respondent respectfully submits that the judgment of the Supreme Court of Bermuda was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (among other)

R E A S O N S

1. BECAUSE evidence of Mrs. Bargett describing what Wendy had said to her was rightly held to be inadmissible;

2. BECAUSE it was as a result of the correct application by the learned Chief Justice of well established rules that evidence of statements made by the Appellant was admitted;

3. BECAUSE the said Statements of the Appellant were shown to have been freely and voluntarily made;

4. BECAUSE the learned Chief Justice's charge to the jury was accurate in matters of fact and correct in matters of law;

5. BECAUSE the verdict of the jury was fully justified by the evidence;

6. BECAUSE there is no reason for supposing that any miscarriage of justice has occurred.

J.G. LE QUESNE.

~~D.A. KEMP.~~

Mervyn Beald.

No. 16 of 1963

IN THE PRIVY COUNCIL.

O N A P P E A L

FROM THE SUPREME COURT OF BERMUDA

B E T W E E N

BILLY MAX SPARKS Appellant

- and -

THE QUEEN Respondent

CASE FOR THE RESPONDENT

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